No. 92-1455

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Petitioner,

—v.—

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT OF THE CASE

This case comes before the Court on a motion to dismiss. Accordingly, the facts alleged by respondents in this action -- the NAACP and its Milwaukee branch, Celestine Lindsey, Dorothy Listenbee, James Milner, Dianne Pratt, Marvin Pratt, Simon Williams, Beverly Williams, and Lois Woods and a class of similarly situated persons -- must be taken as true.

In their complaint, respondents alleged that American Family employs a variety of practices in order to avoid doing business with homeowners on the basis of race and the geographical location of their home and to discourage these homeowners from seeking insurance from American Family. Specifically, respondents contend in their complaint that American Family ignores the individual characteristics of property owners and their properties when making decisions about homeowner's insurance, and instead discriminates by relying upon gross generalizations and racial stereotypes imputed to all property owners within a given geographical territory.

In response to these practices and policies, more commonly defined as insurance "redlining," respondents stated five causes of action under federal and state law: (1) the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§3604 *et seq.*; (2) the Civil Rights Act of 1870, 42 U.S.C. §1981; (3) the Civil Rights Act of 1866, 42 U.S.C. §1982; (4) the State of Wisconsin Fair Housing Act, Wis Stats. §101.22(2)(e); and (5) the State of Wisconsin Insurance Code, Wis. Stats. §§625.11(1) and 628.34(3) and Wis. Admin. Code §Ins. 6.68.

American Family moved to dismiss under Fed.R.Civ. P. 12(b) for failure to state a claim upon which relief can be granted for only two of respondents' five claims, the federal Fair Housing Act and state insurance law claims. The district court granted American Family's

motion in a ruling from the bench on December 17, 1990. Pet.App. at 28a-33a. The court also directed the entry of a final judgment under Fed.R.Civ.P. 54(b). Pet.App. at 31a. Respondents appealed this ruling to the United States Court of Appeals for the Seventh Circuit.

The Seventh Circuit reversed the district court's ruling on whether respondents had a claim under the Fair Housing Act, finding that regulations promulgated by the Department of Housing and Urban Development correctly interpreted the Act as prohibiting insurance "redlining," and that the application of the Fair Housing Act is not prevented by the McCarran-Ferguson Act, 15 U.S.C. §§1011 *et seq.*[1] Pet.App. at 9a-24a.

SUMMARY OF ARGUMENT

There is less dispute about the law that governs this case than petitioner suggests. There is no question that petitioner is prohibited by state law from discriminating on the basis of race in the provision of homeowner's insurance, so the legal mandate to petitioner is clear. Indeed, petitioner itself has conceded throughout this litigation that racial discrimination in the provision of insurance is indefensible. Nevertheless, petitioner would like this Court to decide whether the federal Fair Housing Act also prohibits such discrimination. A decision by this Court is not, however, warranted at this time.

There is no meaningful split in the circuits, despite petitioner's claims to the contrary. The agency charged with interpreting the Fair Housing Act has duly promulgated regulations on this exact point, and only one cir-

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[1] The Seventh Circuit affirmed the lower court's decision to dismiss the state insurance code claims. Pet.App. at 24a-27a.

cuit court has as yet had the opportunity to review the regulations. That decision, by the Seventh Circuit, was fully consistent with congressional intent and correctly applied this Court's precedents to conclude that deference to the agency's regulations was appropriate. At the very least, other circuit courts should be given the opportunity to consider the regulations before this Court reaches out to review the agency's determination.

In addition, the Seventh Circuit's ruling on the McCarran-Ferguson Act is nothing more than a straightforward application of the law on preemption, and thus does not justify plenary review by the Court. Furthermore, the Seventh Circuit's view that the McCarran-Ferguson Act is not a barrier to relief in this case is consistent with every other lower court ruling on the subject. In asking this Court to review this decision simply because the analysis -- but not the result -- differed from another circuit, petitioner seeks the sort of advisory opinion that this Court has historically refused to provide.

Finally, the decision below is correct on the merits. Its analysis of both the Fair Housing Act and the McCarran-Ferguson Act is well reasoned and well supported by this Court's case law. Moreover, as petitioner has conceded: "'Redlining,' whether practiced by a financial institution, an insurance company, or a governmental body, is reprehensible." Petition for a Writ of *Certiorari* at 5. This concession belies the claim of petitioner and its supporting *amici* that the Seventh Circuit's decision will result in industry-wide confusion.

REASONS FOR DENYING THE WRIT

I. IT IS PREMATURE FOR THIS COURT TO RESOLVE THE FAIR HOUSING ACT ISSUE RAISED BY PETITIONER, SINCE THE SEVENTH CIRCUIT IS THE ONLY CIRCUIT COURT THAT HAS YET REVIEWED THE RECENTLY PROMULGATED AGENCY REGULATIONS THAT PETITIONER CHALLENGES, THE SEVENTH CIRCUIT DECISION CORRECTLY INTERPRETED CONGRESSIONAL INTENT, AND IN ANY CASE THE MANDATE TO PETITIONER NOT TO DISCRIMINATE IS UNDISPUTED

A. There Is No Meaningful Conflict Among The Circuits That Justifies Plenary Review At This Time

There is not nearly as much at stake for petitioner at this atage of the proceedings as petitioner suggests. There is no question that petitioner is prohibited by law from discriminating on the basis of race in its provision of homeowner's property and hazard insurance. Petitioner, in fact, concedes that Wisconsin state law "provides a comprehensive regulatory structure that unequivocally prohibits racial discrimination by all insurance companies doing business in the state." Pet.Cert. at 24-25. Moreover, petitioner has maintained throughout this litigation that it believes racial discrimination in the provision of insurance to be wrong, and it has strenuously denied that it discriminates on the basis of race.

Accordingly, this petition has a certain abstract legal quality to it. As a matter of practice, petitioner does not claim the right to discriminate on the basis of race in its provision of insurance, and would not claim that it did even if the federal Fair Housing Act were declared inapplicable. As a matter of law, petitioner would be barred from discriminating by state statute even if this Court ruled in its favor. Those state claims, and other federal

claims,[2] remain to be tried regardless of the outcome of this petition. In fact, discovery and other preparation for the trial proceeds even while this petition is pending.

Petitioner nevertheless asks this Court to step in now and review the Department of Housing and Urban Development (H.U.D.)'s regulations holding that §3604 of the Fair Housing Act prohibits racial discrimination in the provision of homeowner's property and hazard insurance. Petitioner's request is misplaced for several reasons: (1) there is in fact no split among the circuits, despite petitioner's argument to the contrary; (2) the Seventh Circuit's decision correctly interpreted Congress' intent in enacting the Fair Housing Act; and (3) the regulations at issue are fairly recent, and lower federal courts should be given additional time to review them before this Court rules on them.

First, the purported conflict between the Seventh and Fourth Circuits that petitioner raises is a specious one. The Seventh Circuit's decision holding that insurance redlining is prohibited by §3604 of the Fair Housing Act, 42 U.S.C. §3604, is the *only* circuit court decision decided after H.U.D. promulgated regulations that included insurance redlining as conduct prohibited by §3604. By contrast, the Fourth Circuit decision that petitioner relies on, *Mackey v. Nationwide Insurance Cos.*, 724 F.2d 419 (4th Cir. 1984), was decided nine years ago in the absence of any regulations from H.U.D. interpreting the Act on this point. *Mackey* was also decided prior to Congress enacting a statute that expressly authorized

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[2] Respondents have also raised claims that petitioner's racial discrimination in the provision of homeowner's insurance violates the Civil Rights Act of 1870, 42 U.S.C. §1981, and the Civil Rights Act of 1866, 42 U.S.C. §1982. Those claims are not at issue in this petition. Indeed, petitioner did not raise affirmative defenses to respondents' §§1981 and 1982 claims in its answer in this case; the §§1981 and 1982 claims were not at issue in the district court, and were not involved in the Seventh Circuit appeal.

H.U.D. to promulgate regulations interpreting §3604 of the Act. *See* 42 U.S.C. §3614a (1988).

As this Court's precedents make clear, the adoption of duly promulgated regulations on point changes the legal analysis that a reviewing court is bound to apply. *See, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This is because of the well-established rule that regulations validly promulgated by agencies pursuant to congressional authority have the full force and effect of statutory law. *See Yiatchos v. Yiatchos*, 376 U.S. 306 (1964). In particular, H.U.D. regulations interpreting the Fair Housing Act "command considerable deference" on review. *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 107 (1979). The Fourth Circuit, ruling in 1984, was of course not able to accord the agency's regulations any deference at all.[3]

Petitioner ignores the effect of these new regulations and simply contends that "[n]ow, two courts of appeals have addressed the applicability of the Fair Housing Act to insurance companies and reached opposite results." Pet.Cert. at 12. This mischaracterizes the cases and attempts to create a conflict among the circuits where none exists. The Seventh Circuit, in its decision in this case, correctly explained why there is in fact no conflict between its holding and the Fourth Circuit's: "Events

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[3] The obsolescence of the Fourth Circuit's analysis, now that H.U.D. has duly promulgated regulations on point, is apparent even from petitioner's characterization of the *Mackey* decision. Petitioner contends that the Fourth Circuit reached its determination that Congress did not intend the Fair Housing Act to apply to discrimination in insurance "as much on common sense as on any rule of statutory construction." Pet.Cert. at 14. Under well-established principles of administrative law, a court reviewing agency regulations may not simply impose its own "common-sense" reading of the statute, but must instead accord the agency's expert interpretation appropriate deference. *See Chevron*, 467 U.S. at 866 ("Federal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do.")

have bypassed *Mackey* . . . . No matter how a court should have understood the Fair Housing Act in 1984 . . . . the question today is whether the Secretary's regulations are tenable. They are." Pet.App. at 24a. For these reasons, the conflict between circuits that petitioner purports to find simply does not exist.

Second, petitioner is mistaken in its contention that "the Fourth Circuit, not the Seventh Circuit, correctly construed the Fair Housing Act." Pet.Cert. at 13. The Seventh Circuit correctly interpreted congressional intent when it held that §3604 of the Fair Housing Act should properly be held to apply to discrimination in homeowner's property and hazard insurance. The plain language and legislative intent of §3604 make clear that the provision must prohibit racial discrimination in insurance. And, indeed, the two reported decisions on this issue other than *Mackey* have so held. *See McDiarmid v. Economy Fire and Casualty Co.*, 604 F.Supp. 105 (S.D. Ohio 1984); *Dunn v. Midwestern Indemnity Mid-American Fire and Casualty Co.*, 472 F.Supp. 1106, 1109 (S.D. Ohio 1979).

The plain language of §3604 demonstrates Congress' intent that racial discrimination in the provision of homeowner's property and hazard insurance must be covered. Section §3604 makes it illegal to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person because of race . . . ." 42 U.S.C. §3604 (emphasis added). The denial of homeowner's property and hazard insurance does in fact make housing unavailable. As the *Dunn* court explained:

> 'Adequate insurance coverage is often a prerequisite to obtaining financing. Insurance redlining, by denying or impeding coverage, makes mortgage money unavailable, rendering dwellings "unavailable" as effectively as

> the denial of financial assistance on other grounds . . . .'

Dunn, 472 F.Supp. at 1109 (*quoting* Memorandum of the General Counsel of Housing and Urban Development to Chester McGuire, Assistant Secretary for Equal Opportunity (Aug. 15, 1978)).[4]

The legislative history of the Act also suggests that Congress intended §3604 to prohibit racial discrimination in the provision of homeowner's property and hazard insurance. The Fair Housing Act was a sweeping statute aimed at replacing ghettos with "'truly integrated and balanced living patterns.'" *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972)(quoting comments of Sen. Mondale). This Court has held that provisions of the Act are owed a broad construction. *See id.* at 212. And numerous courts have held that the scope of the phrase "otherwise make unavailable or deny" is "as broad as Congress could have made it." *See, e.g., United States v. Housing Auth. of City of Chickasaw*, 504 F.Supp. 716, 726 (S.D.Ala. 1980); *Dunn*, 472 F.Supp. at 1108; *United States v. Hughes Memorial Home*, 396 F.Supp. 544, 549 & n.5 (W.D.Va. 1975); *United States v. Youritan Constr. Co.*, 370 F.Supp. 643, 648 (N.D.Cal. 1973), *aff'd as modified*, 509 F.2d 623 (9th Cir. 1975); *Zuch v. Hussey*, 366 F.

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[4] The fact that H.U.D. took this position in advance of promulgating formal regulations interpreting §3604 as prohibiting insurance redlining does nothing to detract from the force of the regulations that were issued. To the contrary, it may well be an indicator of the result that Congress sought in its 1988 Amendments to the Fair Housing Act. As the Seventh Circuit observed, when Congress delegated to H.U.D. the authority to promulgate regulations interpreting the Act, it did so "with knowledge that since 1978 a succession of Secretaries" have believed that insurance redlining renders housing "unavailable" for purposes of the Act. Pet.App. at 23a.

Supp. 553, 557 (E.D. Mich. 1973); *see also Mayers v. Ridley*, 465 F.2d 630, 635 (D.C.Cir. 1972)(*en banc*)(Fair Housing Act to be read "expansively in order to fulfill [its] purpose"). In any case, even if one could plausibly argue about the meaning of the statutory language, that uncertainty has been settled by H.U.D.'s authoritative interpretation of the statute. *See* IB, *infra*.

Finally, it would be premature for this Court to grant *certiorari* and resolve the Fair Housing Act question at this time. The lower federal courts have had little opportunity to review the regulations that petitioner challenges. To date, the Seventh Circuit is the only circuit that has subjected these regulations to judicial review. *See* Pet.App. at 1a. Granting the writ and resolving the issue at this time would deprive this Court of the benefit of the lower courts' analysis of the H.U.D. regulations and the proper scope of the Fair Housing Act. It would thus prevent those courts from "serv[ing] as laboratories in which the issue receives further study" before this Court addresses it. *McCray v. New York*, 461 U.S. 961 (1983)(Stevens, J., opinion respecting denial of petitions for writs of *certiorari*).

There is no compelling reason not to allow lower courts the opportunity to consider the H.U.D. regulations before this Court steps in and resolves the issue. Petitioner does not claim that if it succeeded in overturning the Seventh Circuit's ruling it would be freed from liability for any racial discrimination it may have engaged in while providing homeowner's property and hazard insurance. To the contrary, it concedes that Wisconsin state law prohibits such practices. *See* p.4, *supra*. Furthermore, respondents' state-law claims would proceed to trial in any event. Under these circumstances, plenary review is neither necessary nor warranted at this preliminary stage in the proceedings.

B. The Seventh Circuit's Decision Correctly Applies This Court's Decisions On The Deference Owed To Administrative Agencies And The Scope Of The Fair Housing Act

The Seventh Circuit appropriately deferred to agency regulations directly on point in construing the Fair Housing Act. The H.U.D. regulations on which the Seventh Circuit relied expressed the Secretary's expert determination that the conduct prohibited by §3604 of the Fair Housing Act included "[r]efusing to provide .... property or hazard insurance for dwellings or providing such .... insurance differently because of race." 24 C.F.R. §100.70(d)(4).

In upholding the validity of the regulations, the Seventh Circuit appropriately began by considering the text and history of §3604. *See* Pet.App. at 16a-23a. It then analyzed the regulations and the history of their adoption, and determined that §3604 of the Act "can bear the Secretary's construction." *Id.* at 23a. Given this conclusion, the circuit court found that it was bound by this Court's precedents in *Chevron*, 467 U.S. 837, and *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. __, 111 S.Ct. 2524, 2534-36 (1991), to accept the agency's construction of the statute.

Petitioner misreads this Court's holding in *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), to argue that the Seventh Circuit deferred improperly to H.U.D.'s construction of the Fair Housing Act. This Court has long made clear, both before *Adams Fruit* and after, that judicial deference to an agency's construction of a statute is appropriate when Congress has delegated policy-making authority to the agency either through (1) "express delegation," or (2) "the introduction of an interpretive gap in the statutory structure." *Pauley v. Bethenergy Mines*, 111 S.Ct. at 2534. Because the regulations that petitioner challenges are authorized by both of these forms of congressional delegation, the Seventh Circuit's deference to

the regulations was correct.

H.U.D.'s regulations interpreting §3604 of the Fair Housing Act to apply to discrimination in the provision of homeowner's property and hazard insurance are clearly supported by an "express delegation." When Congress amended the Act in 1988, it passed §3614a, authorizing H.U.D. to promulgate rules to carry out "this subchapter," which includes 42 U.S.C. §3604 through §3614a. *See* 42 U.S.C. §3614a. In addition to this recent express delegation, this Court has long recognized H.U.D.'s authority to interpret the Fair Housing Act. *See, e.g., Trafficante*, 409 U.S. 205.

The regulations also clearly fill "an interpretive gap in the statutory structure." This Court has instructed that agencies have the power to fill statutory gaps "'left, implicitly or explicitly, by Congress.'" *Chevron*, 467 U.S. at 843 (citation omitted). Even an implicit statutory gap constitutes a congressional delegation, and "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844. Section 3604 contains a clear interpretive gap for H.U.D. to fill. This provision makes it illegal to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person because of race . . . ." 42 U.S.C. §3604 (emphasis added). A leading commentator on the Fair Housing Act has described the "otherwise make unavailable or deny" language as a "catch-all phrase." *See* R. Schwemm, HOUSING DISCRIMINATION LAW 48 (1983). This phrase is precisely the kind of statutory gap that is appropriately filled by an agency's expert interpretation.

Adams Fruit is not to the contrary. In *Adams Fruit*, this Court applied these well-established administrative law principles. But the *Adams Fruit* Court found that the agency interpretation at issue was not entitled to *Chevron* deference because there was neither a statutory

gap nor a congressional delegation. The petitioner in *Adams Fruit* contended that the statute at issue had a "statutory gap" because it failed to state specifically that it was not preempted by state law. The Court rightly rejected this argument, stating that "[a] gap is not created in a statutory scheme merely because a statute does not restate the truism that States may not pre-empt federal law." 494 U.S. at 649. This is, of course, far different from the case at bar, in which the statutory gap is created by an express "catch-all phrase" written into the text of the statute.

In addition, the *Adams Fruit* Court found that Congress had not delegated the agency administrative authority over the *enforcement provisions* of the statute at issue in the case. At the same time, the Court found that the agency was indeed authorized to interpret the motor vehicle provisions of the statute that formed the basis of the legal claims in the case. *See id.* at 650 ("Congress clearly envisioned, indeed expressly mandated, a role for the Department of Labor in administering the statute by requiring the Secretary to promulgate standards implementing [the statute's] motor vehicle provisions").

Properly understood, therefore, *Adams Fruit* lends no support to petitioner's argument. Unlike the regulations at issue in *Adams Fruit*, the ones at issue in this case fill a statutory gap and were promulgated pursuant to an express congressional delegation. Also unlike *Adams Fruit*, the regulations in this case do not reach into the sensitive area of the federal judiciary's role in enforcing a congressional enactment. To the contrary, the regulations interpreting §3604 are much more similar to the agency's standards "implementing [the statute's] motor vehicle provisions" that the Court in *Adams Fruit* held to be clearly within the agency's authority.

II. THE SEVENTH CIRCUIT'S RULING ON THE McCARRAN-FERGUSON ACT DOES NOT WARRANT REVIEW

The interpretation of the McCarran-Ferguson Act adopted by the court below is consistent with this Court's pronouncements on preemption and consistent in result, if not always in analysis, with other federal court decisions in this area. Rather than issue the advisory opinion that petitioner seeks, therefore, *certiorari* should be denied.

A. The Decision Below Correctly Applied The Law On Preemption

The McCarran-Ferguson Act provides that: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. §1012(b). The Seventh Circuit's ruling is a straightforward application of the language of the McCarran-Ferguson Act.

As the Seventh Circuit held, "[t]he McCarran-Ferguson Act establishes a form of inverse preemption, letting state law prevail over general federal rules -- those that do not 'specifically relate[] to the business of insurance." Pet.App. 9a. However, as the Seventh Circuit also noted, the language of the McCarran-Ferguson Act contemplates this "inverse preemption" only if general federal rules "invalidate, impair or supersede" state regulation. Applying that statutory mandate in the context of this case, the Seventh Circuit appropriately asked: "What state law regulating the business of insurance does Title VIII 'invalidate, impair, or supersede'?" Pet.App. at 13a; *SEC v. National Securities, Inc.*, 393 U.S. 453, 462 (1969). The answer is none. As Judge Easterbrook observed: "American Family has not drawn to our attention . . . any law, regulation, or decision in Wisconsin re-

quiring redlining, condoning that practice, committing to insurers all decisions about redlining, or holding that redlining with discriminatory intent (or disparate impact) does not violate state law."[5] Pet.App. at 16. In the absence of any inconsistent state regulation, the preemption provisions of the McCarran-Ferguson Act simply do not apply.

Only last Term, this Court made clear that the scope of a preemption provision "is governed entirely by the express language in [the Act]." *Cippollone v. Liggett Group, Inc.*, 505 U.S. __, 112 S.Ct. 2608, 2618 (1992):

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicum of' congressional intent with respect to state authority,' 'there is no

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[5] The fact that federal law may treat differently conduct that state law also prohibits does not necessarily -- and certainly not in this case -- establish the sort of inconsistency necessary to trigger the preemption provisions of the McCarran-Ferguson Act. *See California v. ARC America Corp.*, 490 U.S. 93 (1989)(holding that states may require offenders to pay damages to indirect purchasers, in addition to the treble damages required under federal law to direct purchasers); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985)(holding that local ordinances imposing requirements beyond federal regulations cannot be stricken down as being in conflict with the federal scheme where those requirements do not imperil the federal goal); *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984)(holding that states may duplicate federal law in requiring businesses pay punitive damages, even though federal law sets a much lower cap on monetary liability). Petitioner has submitted no evidence that the purposes of the state of Wisconsin would be frustrated if a federal cause of action were recognized in this case. Certainly, the state of Wisconsin has not come forward to make this claim. Pet.App. at 16a; *see Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. at 721.

> need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation.

Id. (citations omitted). Conversely, "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Id.* The McCarran-Ferguson Act is no exception.

These principles were faithfully applied by the Seventh Circuit to the preemption provision contained in the McCarran-Ferguson Act. More generally, the Seventh Circuit adhered to this Court's observation that "the starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning of a statute, is the language of the statute itself." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979); *see Union Labor Life Ins. Co. v. Perino*, 458 U.S. 119 (1982); *SEC v. National Securities, Inc*, 393 U.S. 453.

Petitioner would like to read the phrase "invalidate, impair or supersede" out of the McCarran-Ferguson Act for purposes of this case and substitute instead a total ban on any federal regulation that touches on insurance or affects the business of insurance companies.[6] A petition for *certiorari*, however, is not the solution to petitioner's problems. If petitioner wants to rewrite the McCarran-Ferguson Act, its pleas should be addressed to Congress and not to this Court.

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[6] Petitioner grossly overstates the relevance of *FTC v. National Casualty Co.*, 357 U.S. 560 (1958), for purposes of this case. The holding in *Nationwide Casualty* rested on the existence in the McCarran-Ferguson Act of a specific and broad preemption provision for the Federal Trade Commission Act, 357 U.S. at 562, n.2, which has no application to respondents' Title VIII challenge to insurance redlining.

B. There Is No Conflict Between The Circuits On This Issue

1. The Seventh Circuit's Ruling Is Consistent With The Fourth Circuit's Ruling In *Mackey*

There is no conflict between the Seventh Circuit's decision and any other federal court of appeals decision regarding the impact of the McCarran-Ferguson Act on the applicability of the Fair Housing Act to the practice of insurance "redlining." To the contrary, the Seventh Circuit's analysis of the McCarran-Ferguson Act is in accord with the *Mackey* decision by the Fourth Circuit, the only other federal court of appeals to rule on the applicability of the Fair Housing Act to insurance "redlining."

As the Seventh Circuit did, the Fourth Circuit in *Mackey* applied McCarran-Ferguson's "invalidate, impair or supersede" language to any potentially applicable state law or regulation. Like the Seventh Circuit here, the Fourth Circuit determined that there was not "any law enacted by North Carolina which would be 'impaired' by application of the Fair Housing Act . . . ." *Mackey*, 724 F.2d at 421. "In these circumstances, barring these claims is unnecessary to the effectuation of the congressional goals in enacting McCarran-Ferguson, insuring that the states retain the power to regulate the business of insurance and providing regulated insurance companies with a limited exemption from the antitrust laws." *Id.*

The decisions of the Fourth and Seventh Circuits are consistent with the decisions of every other federal court which has addressed this issue. Since 1979, federal courts have consistently found the McCarran-Ferguson Act not to be a barrier to addressing the problem of insurance "redlining" through the Fair Housing Act. *See McDiarmid v. Economy Fire & Casualty Co.*, 604 F.Supp. at 108-09; *Pierce v. Metropolitan Property and Liability*

Ins. Co., No. C-3-82-044 (S.D. Ohio Nov. 25, 1983); *Dunn v. Midwestern Indemnity Company*, 472 F.Supp. at 1111-12.

The Seventh Circuit's ruling is thus clear in its application of this Court's precedents and consistent with the prevailing view of the lower courts. *Certiorari* is unwarranted, therefore, on either ground.

2. The Seventh Circuit's Ruling Is Consistent In Result, If Not In Analysis, With The Second Circuit's Decision In *Spirt*

Petitioner suggests that there is a split between the Seventh Circuit and the Second Circuit. This characterization, however, is misleading. In *Spirt v. Teachers Ins. and Annuity Ass'n*, 691 F.2d 1054, 1065 (2d Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983), the Second Circuit held that the McCarran-Ferguson Act was not applicable to Title VII and that the Act did not apply to any subsequently enacted civil rights legislation. As a part of its opinion in this case, the Seventh Circuit disagreed with the Second Circuit's analysis in *Spirt*, but, for different reasons, obtained the same result: the McCarran-Ferguson Act would not be a bar to respondents' Fair Housing Act claim.

By attempting to elevate this analytic dispute into an argument for *certiorari*, petitioner asks this Court to issue an advisory opinion that will have no meaningful impact on the actual parties. This Court has historically declined to play that role. *Montana v. Imlay*, 506 U.S. __, 113 S.Ct. 444 (1992).

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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Dated: April 6, 1993